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NO. 329

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER

vs.

REYNOLDS-DAVIS GROCERY COMPANY,
RESPONDENT

BRIEF FOR RESPONDENT

STATEMENT

The car of sugar in question was shipped from Raceland, Louisiana, under bill of lading dated April 7, 1920, issued by Morgan's Louisiana & Texas Railroad & Steamship Company. The route designated in the bill of lading shows the Petitioner, the Missouri Pacific Railroad Company, as the delivering or terminal carrier (R. 28) The consignment was made to shipper, Fort Smith, Arkansas, notify Reynolds-Davis Grocery Company (Respondent) (R. 29.) Petitioner received the car from the initial carrier, transported it to within the city limits of Fort Smith over its own lines and, through a "switching arrangement" with the St. Louis & San Francisco Railway Company (hereinafter called Frisco), delivered it at the warehouse of Respondent (R. 8.)

The Frisco did not handle the car under the bill of lading. It knew nothing about any bill of lading. It did not share in the distribution of the freight charges. It merely handled the car as a switchman and was paid a switching fee by

Petitioner (R. 8.) Petitioner took up the bill of lading from Respondent and collected the entire freight charges (R. 25-26.) The Frisco had nothing to do with either. With these facts before it, absolutely undisputed, the trial court, in effect, held that Petitioner was the terminal or delivering carrier insofar as the Common Law presumption of place of loss is concerned, and the Supreme Court of Arkansas upheld this view.

Thereore, if Petitioner has, in apt time and proper manner, presented a question that gives this Court jurisdiction of this cause (which we do not concede,) that question is:

Is the Interstate Commerce Act, as amended by the Transportation Act, to be construed as defining which railroad shall be deemed the terminal carrier in an interstate shipment?

EVEN IF A FEDERAL QUESTION EXISTS IT WAS NOT PROPERLY PRESENTED

There is not the slightest suggestion of a Federal question in the pleadings. The complaint (R. 1) makes the usual allegations of failure to deliver, and the answer (R. 4) is made up of a series of specific denials. At the trial of the cause the only testimony which might even remotely suggest a Federal question was that of P. W. Furry, the Frisco's General Agent in Fort Smith, who testified as follows: (R. 9)

Q "Switching rates for this switching is fixed by the Interstate Commerce Commission?

A "It is carried in the interstate commerce tariffs."

It is apparent from the record that this was merely an incident in the trial. Petitioner did not rely on this defense but relied on the defense that the loss occurred prior to the delivery of the car to Petitioner. Petitioner introduced two witnesses by whom it attempted to prove that the goods were never even delivered to the initial carrier, or that they were extracted from the car while the car was in the custody of the initial carrier (R. 42-43.) This was the defense relied upon. It was submitted by the court in

instruction No. 4 given at Petitioner's request (R. 49.) It is true that in instructions Nos. 2 and 3 (R. 48-49,) requested by Petitioner it, in effect, asked the trial court to hold that Petitioner was an intermediate carrier; but in the absence of an affirmative pointing out of the Federal Statute under which such defense was set up, the trial court presumed that the claim was asserted under the State Law.

Miller vs. Cornwall R. Co., 168 U. S., 131.

Therefore, the question was not at any time or in any manner presented to the trial court. It has been consistently held by this Court that the Federal right, title, privilege or immunity must be set up or claimed in the trial court when under the State practice the highest State Court, in reviewing the judgments of the trial court, refuses to consider questions not therein raised.

Baldwin vs. Kansas, 129 U. S., 52.
Spies vs. Illinois, 123 U. S. 131.
Brook vs. Missouri, 124 U. S., 394.
Morrison vs. Watson, 154 U. S., 111.
Layton vs. Missouri, 187 U. S. 356.

Therefore, it was necessary to set up the Federal question in the trial court, for under the Arkansas practice the Supreme Court will consider only such questions as were raised below.

Hanson vs. Anderson, 91 Ark., 443.

Even if we leave out of consideration the necessity of so presenting the question to the trial court as to enable that court to pass on it, Petitioner has not set up or claimed its supposed right under a Federal Statute with sufficient definiteness and particularity to give this Court jurisdiction under the numerous applicable decisions of this Court.

F. G. Oxley Stave Co., vs. Butler Co., 166 U. S., 648.
Michigan Sugar Company vs. Michigan, 185 U. S., 112.
Chicago & N. W. R. Co. vs. Chicago, 164 U. S., 454.
Johnson vs. New York L. Ins. Co., 187 U. S., 491.

THE SUPREME COURT OF ARKANSAS DECIDED ONE QUESTION AND ONLY ONE, VIZ: THAT PETITIONER'S LIABILITY WAS THAT IMPOSED BY THE

COMMON LAW ON A TERMINAL OR DELIVERING CARRIER, AND ITS DECISION IS CORRECT.

The Supreme Court of Arkansas did not decide as a fact (as asserted by Petitioner, its brief (p. 8), that the Frisco lost the sugar. That question was not before it. In its Statement of facts, the court merely said, (R. 54-55): "The car arrived at Fort Smith on April 19th and was delivered by the appellant (Petitioner) to the Frisco Railroad in good order, with the seals unbroken. The appellant (Petitioner) took a receipt from the Frisco showing that the car was in good order when delivered to the latter company." The testimony on which this statement of the Supreme Court of Arkansas is based, is that Petitioner placed the car on the Frisco connection with the original seals intact, and that the actual interchange or delivery of the car to the Frisco took place several hours later. The testimony was sufficient to enable the jury to determine, if that had been necessary, that the loss occurred after the car was set on the Frisco connection but before actual delivery had been made to the Frisco (R. 14, 16, 17, 19, 20, 45.) This Court will not be concluded by the mere language used by the Supreme Court of Arkansas, but the real substance and effect of its decision will be inquired into and determined.

McCullough vs. Virginia, 172 U. S., 102.

Neither did the Supreme Court of Arkansas decide that there was no possible liability of any kind attaching to the Frisco, as asserted by counsel (Petitioner's brief, p. 22.) The Frisco was not a party and the question of its liability was not before the court. The court merely decided that the Common Law presumption as to place of loss applied to Petitioner and not to the Frisco under the facts presented.

It will be noted that the Supreme Court of Arkansas did not base its decision solely on the language of the bill of lading but also took into consideration what was done under the bill of lading. In its statement of facts, the Supreme Court of Arkansas said: (R. 54.)

> "The Frisco did not handle the car under the bill of lading and did not share in the distribution of the freight charges. The appellant paid the Frisco the

sum of $6.30, its switching fee, for the service in switching the car to the warehouse of the appellee."

and in its opinion said: (R. 55-56.)

"The Frisco Railroad Co., was not named in this bill of lading as a connecting carrier and the services it performed in the premises under its switching arrangements with the appellant were not as a connecting carrier, but purely and simply at the instance, and as the agent, of appellant. The terms of the bill of lading control here."

and cited the following cases to sustain its conclusion:

Western & Atlantic Railroad Company vs. Exposition Cotton Mills (Ga.), 2 L. R. A., 102; 7 S. E., 916.

Shapiro vs. Boston & Maine Railroad, 213 Mass., 70; 99 N. E., 459.

St. Louis & Southwestern Railway Co., vs. Jackson & Company, (Tex.), 118 S. W., 853.

Atlantic National Bank vs. Southern Railway Company, 106 Federal, 623.

Every one of the above cases is directly in point. The facts are practically identical with the facts here. In every instance an interstate shipment was involved. In every instance the switching facilities made use of were apparently a part of a general railroad system engaged in interstate transportation. After a careful search we have been unable to find a single case wherein a contrary conclusion has been reached. Other cases supporting this conclusion are:

Central Ry. vs. Jones, 7 Ga. App. 165; 66 S. E., 492.

Kentucky Bridge Co. vs. Louisville, etc., Ry. 37 Fed., 567.

Fasy vs. International Nav. Co., (N. Y.), 77 App. Div. 469 79 N. Y. S., 1103 (Affirmed without opinion, 177 N. Y. 591; 70 N. E., 1098.)

It would seem that this precise question has not been decided by this Court in terms. However, this Court has definitely held that in an interstate shipment the bill of lading is controlling, and has defined the term "terminal carrier" to mean the last connecting carrier operating

under the bill of lading. Strangely enough, two cases so holding are cited for other purposes in Petitioner's brief.

Georgia F. A. R. R. Co. vs. Blish Milling Co., 241 U. S., 190.

Oregon, Washington & R. and N. Co. vs. McGinn, 258 U. S., 409.

In the Blish case this Court, speaking through Mr. Justice Hughes, said:

> "The connecting carrier is not relieved from liability by the Carmack (Cummins) Amendment, but the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation, and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid."

Later on in this opinion the Court used this language:

> "As we have said, the latter (terminal carrier) takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms; (citing cases) and if the clause must be deemed to cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the case of the terminal carrier, which, in the contemplation of the parties, was to make the delivery."

In the McGinn case the Court, speaking through Mr. Justice Clark, reiterated and quoted the language used in the Blish case set out above.

It will thus be seen that in each of these cases, this Court has classified as the terminal carrier the *last connecting carrier operating under the bill of lading.* These cases recognize and give effect to the right of the original parties to the contract of shipment to designate the carrier that is to make the delivery. Certainly it cannot be successfully contended by Petitioner that the language used by Mr. Justice Hughes in the Blish case and quoted by Mr. Justice Clark in the McGinn case, viz: *"the terminal carrier, which, in the contemplation of the parties, was to make the delivery,"* has no meaning. In the case at bar, the parties

to the contract designated Petitioner as the terminal carrier. Petitioner was the carrier which "in the contemplation of the parties was to make the delivery." Petitioner recognized this obligation at the time the delivery was made. Petitioner and not Respondent selected the instrumentality for switching the car to Respondent's warehouse. Petitioner took up the bill of lading from the Respondent and collected the entire freight bill. It performed without question or hesitation all those duties which, per force, devolve upon a terminal carrier. We cannot see any consistency between the attitude asumed by Petitioner at the time this delivery was being made and the attitude it assumes now.

THERE IS NO FEDERAL QUESTION INVOLVED

Petitioner apparently concedes (Petitioner's brief, pp. 19-23) that in the absence of intervention by Congress in such a manner as to change the situation, this case would be governed by the contract between shipper and carrier, and that the liability of the connecting carrier would be that imposed by the Common Law. However, Petitioner argues that Congress has intervened, and for support points to the Interstate Commerce Act, as amended by the Transportation Act, Section 15, Paragraph 3 and 4, pages 485 and 486, 41 Stat. at L. These paragraphs merely confer authority upon the Interstate Commerce Commission, on conditions therein specified, to establish through routes, joint classifications and joint rates or charges. From this it is argued since the Frisco switched the car for Petitioner to Respondent's warehouse and was paid by Petitioner a switching fee for its service, the amount of which is carried in a tariff on file with the Interstate Commerce Commission, that a joint rate had been fixed, and, having been so fixed, the switchman became the delivering carrier without reference to the terms of the bill of lading, and in total disregard of the fact that the switchman did not take under the bill of lading, or have any connection with it, or perform any duty or exercise any authority under it. There is nothing in this record to show that the Interstate Commerce Commission had fixed a through route or a joint rate or charge which involved or included the switching charge of the Frisco. There is nothing in the record from which it can even be inferred that Petitioner was compelled to deliver

the car to Respondent's warehouse, or that it was compelled to deliver it by means of the Frisco switching facilities, or that the two carriers were prevented by any action or order of the Interstate Commerce Commission from entering into a private contract for the switching of this car. The entire record on this point may be abstracted thus:

(a) The initial carrier issued a bill of lading, by the terms of which it undertook to deliver the car to Respondent through Petitioner as the terminal carrier (R. 28-29.)

(b) Petitioner received the car from the initial carrier and brought it into the city limits of Fort Smith. After it had been switched to Respondent's warehouse by the Frisco, Petitioner called on the Respondent, took up the bill of lading, collected the entire freight charge and paid the Frisco a switching fee (R. 8, 25-26.)

(c) The amount of such switching fee is carried in tariffs on file with the Interstate Commerce Commission (R. 9.)

Therefore, even if the statute relied upon by Petitioner could be construed as giving the Interstate Commerce Commission power to convert a switchman into a terminal carrier by directing the route and the method of delivery and the rate to be charged, still Petitioner's argument must fall for the simple reason that it is nowhere shown that this power was exercised.

But the statute will bear no such construction. Under the Interstate Commerce Act, as amended by the Transportation Act, the Interstate Commerce Commission has just such powers and authority as have been specifically conferred upon it by Congress and no more. It may be conceded that Congress has the power to define which railroad shall be deemed the terminal carrier in an interstate shipment and to fix its liability but this can only be accomplished by a positive and plenary statute. In the case of the initial carrier this has already been accomplished by the Carmack and Cummins Amendments. As to connecting carriers, including terminal carriers, Congress has not acted. In this case the Supreme Court of Arkansas has defined a terminal carrier as the last connecting carrier operating

under the bill of lading; and Congress not having acted upon the subject, we respectfully submit that this cause does not present a question for review by this Court.

Respectfully submitted,

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